

<p>1. <b>Definitions</b></p> <p>1.1 In this Agreement:</p> <p><b>Additional Services</b> means those other services, if any, described in the Specific Terms;</p> <p><b>Client Tasks</b> means the tasks that the Client will carry out as set out in the Specific Terms;</p> <p><b>Business Information</b> means business information of the Client or any Trading Partner;</p> <p><b>Deliverables</b> means any deliverable to be completed and/or supplied by the Supplier under this Agreement as more particularly described in the Specific Terms;</p> <p><b>Documentation</b> means all instruction manuals, user guides and other information provided by the Supplier in relation to the Services, whether in hard copy or electronic form;</p> <p><b>Fees</b> means the service fees and any other fees (including any fee for Additional Services) set out in the Specific Terms;</p> <p><b>Intellectual Property</b> means all brand names, trade marks, service marks, trade names, logos, copyrights, patents, licences, designs, know-how, trade secrets, inventions, technical data, concepts, ideas and all other similar property;</p> <p><b>Program</b> means IBM's Series MQ software;</p> <p><b>Services</b> means the services set out in the Specific Terms;</p> <p><b>Special Conditions</b> means the special conditions (if any) set out in the Specific Terms;</p> <p><b>Specific Terms</b> means the specific terms set out at the front of this Agreement;</p> <p><b>Statement of Work</b> means any statement of work set out in the Specific Terms;</p> <p><b>Timetable</b> means any timetable set out in the Statement of Work;</p> <p><b>Trading Partner</b> means a third party with whom the Client wishes to communicate using the Services;</p> <p><b>Translation Map</b> means the programming code written by the Supplier to translate and format Business Information;</p> <p><b>Working Day</b> means a day between Monday and Friday, inclusive, on which businesses and banks in Auckland and Wellington are generally open for business.</p> <p>2. <b>Provision of Services and Deliverables</b></p> <p>2.1 The Supplier will:</p> <p>(a) provide the Deliverables in accordance with the Timetable and any Statement of Work; and</p> <p>(b) perform the Services,</p> <p>on the terms and conditions set out in this Agreement. If there is any inconsistency between the Terms and Conditions for Messaging Services and the Special Conditions, the Special Conditions will prevail.</p>	<p>2.2 The Supplier will perform the Services in a proper, competent and professional manner.</p> <p>2.3 In providing the Services and Deliverables, the Supplier may require assistance from the Client and access to the Client's premises. The Client will ensure that:</p> <p>(a) it performs the Client Tasks in accordance with the Timetable or as otherwise agreed by the parties;</p> <p>(b) the Supplier has reasonable access to the Client's premises to provide the Services and Deliverables;</p> <p>(c) it has complied with any reasonable instructions specified by the Supplier in respect of the Services and Deliverables.</p> <p>2.4 The Supplier will endeavour to perform the Services 24 hours per day, 365 days per year. However, the Client acknowledges that the Supplier's system will suffer outages from time to time (including for scheduled weekly maintenance) and that such outages will not constitute a breach of this Agreement provided that the Supplier has used best endeavours to keep outages to a reasonably acceptable level in accordance with industry standards.</p> <p>2.5 The Client will promptly report to the Supplier any problems it encounters in relation to the Services or any Deliverables.</p> <p>2.6 The Supplier may sub-contract the provision of any of the Services and/or Deliverables to a third party. The Supplier will remain fully responsible for all Services and Deliverables supplied by a sub-contractor.</p> <p>3. <b>Messages</b></p> <p>3.1 The Client shall ensure that any Business Information that it provides to the Supplier and information that it directs or authorises any Trading Partner to provide to the Supplier shall not:</p> <p>(a) infringe or violate any third party's intellectual property rights or any laws or regulations;</p> <p>(b) in the case of electronic messages, contain any viruses or programming routines intended to damage, intercept or expropriate any system, data or personal information; or</p> <p>(c) contain unlawful or offensive material.</p> <p>3.2 The Client shall ensure that Trading Partners have given their consent to receive mail (electronically or otherwise) from the Supplier.</p> <p>3.3 The Supplier reserves the right, in its sole discretion, to refuse to deal with any message from the Client or any Trading Partner if, in its judgement, the message is in violation of clause 3.1.</p> <p>4. <b>Licence</b></p> <p>4.1 The Supplier grants to the Client a non-exclusive, non-transferable licence to use the Deliverables (other than the Program) in conjunction with the Services and solely for the Client's internal business purposes.</p> <p>4.2 The Client will not:</p> <p>(a) cause or permit the reproduction, reverse engineering, disassembly or decompilation of any Deliverables; or</p> <p>(b) make the Deliverables available to any third party for any purpose.</p>	<p>4.3 Additionally, if the Supplier has agreed to supply the Program, the Client:</p> <p>(a) shall not copy, modify and/or transfer the Program;</p> <p>(b) shall not do or permit to be done any thing which is not in compliance with the terms of the IBM International Program License Agreement and its License Information document (available at <a href="http://ibm.com/software/sla">ibm.com/software/sla</a>), including without limitation, reverse assembly, reverse compilation, or other translation of the Program;</p> <p>(c) accepts that the Program is copyrighted and licensed (not sold) to ECN and that ECN's licence shall at no time transfer to the Client;</p> <p>(d) accepts that subject to any statutory warranties which can not be excluded, IBM makes no warranties or conditions, either express or implied, with respect to the use of the Program, including, without limitation, the implied warranties of merchantability, fitness for a particular purpose, and non-infringement;</p> <p>(e) accepts that IBM is not liable for any lost profits, lost savings, or any incidental or other economic consequential damages resulting from the Client's use of the Program;</p> <p>(f) shall not use the Program except when used as part of the Services and shall destroy or return all copies of the Program to the Supplier when the Client no longer purchases the Services; and</p> <p>(g) shall not use the Program outside of New Zealand.</p> <p>4.4 At the Supplier's request, the Client will allow a representative of the Supplier to access the Supplier's premises and records to verify the Client's compliance with this Agreement.</p> <p>5. <b>Set-up</b></p> <p>5.1 The Client will be responsible for providing facilities to enable it to receive or use the Services and Deliverables including computer terminals, communication software and internet access.</p> <p>6. <b>Additional Services</b></p> <p>6.1 The Supplier will provide the Additional Services, if any, set out in the Specific Terms.</p> <p>6.2 So that the Supplier can provide the Additional Services, the Client will cooperate with the Supplier and provide the Supplier with all relevant information reasonably requested by the Supplier.</p> <p>6.3 All expenses properly incurred by the Supplier in connection with the Additional Services will be reimbursed as an additional charge, unless the Supplier has expressly agreed that such expenses will be included in any fee for Additional Services set out in the Specific Terms.</p> <p>7. <b>Pricing and Payment Terms</b></p> <p>7.1 The Client will pay the Fees and all disbursements and any other agreed charges under this Agreement plus GST to the Supplier in accordance with the payment details set out in the Specific Terms and otherwise, monthly, by the 20<sup>th</sup> of the month following the month of invoice.</p> <p>7.2 If the Client disputes any invoice, it will give the Supplier notice of such dispute (within 10 Working Days of receiving the invoice) but will otherwise pay the</p>
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	undisputed part of the invoice. Any disputed amount will be resolved in accordance with clause 12.		may have in the Intellectual Property arising out of the design, development and modification of any Deliverables.	12.	<b>Dispute resolution</b>
7.3	Subject to clause 7.2, if the Client fails to pay any amount due by the due date, the Supplier may without prejudice to its other rights or remedies under this Agreement:	10.2	The Supplier acknowledges that the Client owns all right, title and interest (including all Intellectual Property rights) in the Business Information.	12.1	If a dispute arises out of or relates to this Agreement (the <b>Dispute</b> ) a party to the Agreement may not commence any court proceedings relating to the Dispute unless it has complied with the following paragraphs of this clause except where the party seeks urgent interlocutory relief.
	(a) charge interest on the unpaid amount from the due date until the date of actual payment at 2% per annum over the base overdraft facility rate charged by the Supplier's bankers from time to time; and/or	10.3	Both parties will preserve the confidentiality of all Confidential Information of the other obtained in connection with this Agreement. Neither party will, without the prior written consent of the other, disclose or make any Confidential Information available to any person, or use the same for its own benefit, other than as contemplated by this Agreement.	12.2	A party claiming the Dispute has arisen under or in relation to this Agreement must give written notice to the other party specifying the nature of the Dispute.
	(b) suspend the provision of the Services without liability and without notice.	10.4	For the purpose of this clause 10, "Confidential Information" includes all information exchanged between the parties to this Agreement, whether in writing, electronically or orally, including the Deliverables but does not include information which is, or becomes, publicly available other than through unauthorised disclosure by the other party.	12.3	On receipt of that notice, the parties will use all reasonable endeavours to resolve the Dispute by discussion, consultation, negotiation or other informal means.
8.	<b>Changes</b>			12.4	If the Dispute is not resolved within 20 Working Days of the notice being given pursuant to clause 12.2 (or within such further period agreed in writing by the parties) either party may, by giving written notice to the other party, refer the Dispute to mediation by a mediator jointly appointed by them and failing agreement, a mediator appointed by the chairperson for the time being of LEADR (New Zealand).
8.1	The Supplier may change these terms and/or vary the Fees by giving the Client at least 30 days' notice in writing of the changes.			13.	<b>Force Majeure</b>
9.	<b>Warranties and Limitation of Liability</b>			13.1	The failure or omission to carry out or observe any of the conditions of this Agreement will not give rise to any claim against either party or result in a breach of this Agreement, if such failure or omission arises by reason of delay or inability to perform caused by an event which is beyond the reasonable control of the relevant party, including communication or network failures. This clause does not apply to any obligation to pay money for liabilities incurred prior to the force majeure event.
9.1	The Supplier warrants that to the best of its knowledge and belief, the provision of the Services and any Deliverables does not breach the Intellectual Property rights of a third party.	10.5	Each party will on demand deliver to the other party all Confidential Information and any other documents or information supplied by or obtained from the other party.		
9.2	Except as expressly set out in this Agreement, all representations, conditions and warranties (whether express or implied, statutory or otherwise and including warranties as to the merchantable quality or fitness for any particular purpose of the Deliverables) are expressly excluded.	10.6	This clause 10 will survive termination of this Agreement.		
9.3	The Client acknowledges that the Supplier is in no way responsible for the provision or otherwise of any goods, services or information bought, sold or otherwise dealt with by the Client using the Services and/or the Deliverables or for meeting any obligations that the Client may have to a Trading Partner. The Client will indemnify the Supplier against all costs, expenses, claims and damages incurred by the Supplier as a result of:	11.	<b>Termination</b>		
	(a) the use of the Services and/or the Deliverables by the Client; and/or	11.1	The Client may terminate this Agreement by giving at least 30 days' notice in writing, but this notice may only come into effect after the end of any minimum period during which the Client has agreed to purchase and/or use the Services.		
	(b) any failure by the Client to comply with clause 4.3.	11.2	The Supplier may terminate this Agreement:	14.	<b>General</b>
9.4	Subject to clause 9.3 and except for a breach by either party of confidentiality or the Supplier's Intellectual Property rights as contemplated by clause 10:			14.1	Any notice given under this Agreement will be in writing delivered to the relevant party or sent by post, email or facsimile transmission at such address or number as may be notified in writing by each party to the other from time to time. Any such notice will be deemed received at the time when the same is handed to or left at the address of the party to be served and if served by post two days after the day of posting and if served by email or fax on the day of sending to the correct email address or fax number.
	(a) neither party will be liable to the other in any event for loss of profits, loss of data or any indirect, consequential or special loss or damage suffered or incurred by the other party as a result of anything done by the first party under this Agreement;	11.3	Either party may terminate this Agreement immediately, by giving notice in writing if the other party:	14.2	If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions will remain in force and effect.
	(b) each party's liability to the other party for a claim for damages under this Agreement or in relation to the Services and/or Deliverables will not exceed an amount equal to the Fees paid by the Client to the Supplier during the three calendar months prior to the date of the incident giving rise to the claim.		(a) breaches this Agreement and does not remedy the breach within 14 days after receiving a written notice specifying the breach; or	14.3	If either party waives any default or breach of this Agreement, this will not constitute a waiver of any other or subsequent default or breach. No waiver will be effective unless made in writing.
		11.4	On termination of this Agreement the Client will:	14.4	The Client may not assign or transfer any rights under this agreement.
			(a) pay to the Supplier all sums which have been invoiced which are outstanding and which are properly payable for the Services provided;	14.5	The Supplier will not be liable to the Client for a failure to perform its obligations under this Agreement to the extent that such failure is caused by a failure of the Client to carry out its obligations under this Agreement.
			(b) where termination has occurred other than pursuant to clause 11.2 or at the instigation of the Client pursuant to clause 11.3, pay to the Supplier the outstanding amount of any minimum Fee set out in the Specific Terms.	14.6	Nothing in this Agreement creates a partnership or establishes a relationship of principal and agent or any other fiduciary relationship between the parties.
10.	<b>Intellectual Property and Confidentiality</b>			14.7	This Agreement is governed by the laws of New Zealand and the parties agree to submit to the exclusive jurisdiction of the New Zealand courts.
10.1	Ownership of the Deliverables (other than the Program) and all Intellectual Property arising out of the design and development of any Deliverables by the Supplier (whether or not the Deliverables are complete), and any modification to the Deliverables by the Client or the Supplier, will (unless specifically agreed in writing to the contrary) belong to the Supplier and the Client will not dispute such ownership. The Client hereby assigns to the Supplier any and all rights that it		(c) immediately cease to use all Deliverables and return to the Supplier all copies of any Deliverables in the Client's possession; and		
			(d) within 30 days of termination certify to the Supplier that it has fully complied with its obligations under clause 11.4(c).		